

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

BKY No. 02-41020  
ADV No. 04-4105

Michael R. Russell and Kimberly A. Russell,  
  
Debtor(s).

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Terri A. Georgen, Trustee,  
  
Plaintiff,

vs.

Kimberly A. Russell,  
  
Defendant.

**NOTICE OF MOTION AND MOTION  
FOR AUTHORIZATION TO SERVE AND  
FILE AN AMENDED COMPLAINT**

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TO: Defendant above-named and her attorney, Lorie A. Klein, Moss & Barnett, 4800 Wells  
Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4129.

1. The undersigned, counsel to the Plaintiff herein, moves the court for authorization  
to file and serve an Amended Complaint and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on the 22<sup>nd</sup> day of  
September, 2004 before the Honorable Nancy C. Dreher, Courtroom No. 7 West, U.S.  
Bankruptcy Court, 300 South Fourth Street, Minneapolis, MN 55415.

3. Any response to this motion must be filed and delivered not later than September  
15, 2004 which is 7 days before the date of the hearing or filed and served by mail not later than  
September 17, 2004 which is 10 days before the date of the hearing. UNLESS A RESPONSE

OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding.

5. This case was originally filed as a Chapter 13 case March 19, 2003 and was converted to one under Chapter 7 on June 4, 2003. The first meeting of creditors was originally scheduled for July 11, 2002. The case is now pending in this Court.

6. This motion arises under Bankruptcy Rule 7015 and Plaintiff seeks authorization to file and serve an Amended Complaint in this adversary proceeding. A copy of the Amended Complaint with the amended portions red-lined is attached hereto as Exhibit A.

7. The only additions to the Complaint through the proposed Amended Complaint are the additions to paragraphs 4, 12 and 13, the addition to Count 2 and revisions to the prayer for relief as follows:

12. The Plaintiff seeks a determination by the court that the Annuity and/or rights to payment from the Annuity became property of the bankruptcy estate at the commencement of this bankruptcy case, and remain property of the estate.

13. Because the Annuity and/or rights to payment from the Annuity are property of the bankruptcy estate, the Trustee also seeks an order from the court requiring the Defendant to turnover to the Trustee the Annuity and/or rights to payment from the Annuity, and declaring that the Trustee is the owner of the Annuity and/or rights to payment from the Annuity.

#### **COUNT 2**

14. Plaintiff realleges and reaffirms paragraphs 1 through 13 above.

15. The Annuity and/or rights to payment from the Annuity are not subject to any applicable exemption by the Debtor, nor has the Debtor claimed the Annuity and/or rights to payment from the Annuity as exempt in this case.

16. As of commencement of the bankruptcy case, the Trustee had all the rights and powers set forth under 11 U.S.C. §544.

17. Because the Annuity and/or rights to payment from the Annuity are not subject to exemption, the lien interest held by the Trustee pursuant to 11 U.S.C. §544 against the Annuity and/or rights to payment from the Annuity is superior to any claimed interest of the Debtor in the Annuity and/or rights to payment from the Annuity.

Also, the Amended Complaint prayer for relief contains the following addition:

1. Determining that the Annuity and/or rights to payment from the Annuity are property of the bankruptcy estate, and ordering the Defendant, Kimberly A. Russell, to turnover to the bankruptcy estate the Annuity and/or rights to payment from the Annuity.

2. Determining that the Defendant's claimed interest in the Annuity and/or rights to payment from the Annuity are inferior to the rights held by the Trustee pursuant to 11 U.S.C. §544 and determining that the Defendant is entitled to nothing from the Annuity and/or rights to payment from the Annuity until such time as all Chapter 7 administrative expenses and creditor claims have been paid in full.

WHEREFORE, the Trustee respectfully requests the court's authorization to file and serve an Amended Complaint, a copy of which is attached as Exhibit A.

**FULLER, SEAVER & RAMETTE, P.A.**

Dated: August 23, 2004

By: /e/ Randall L. Seaver

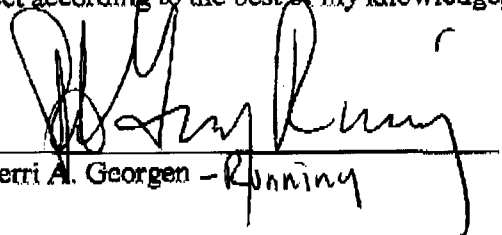
Randall L. Seaver 152882  
12400 Portland Avenue South, Suite 132  
Burnsville, MN 55337  
(952) 890-0888

Attorneys for Plaintiff

VERIFICATION

I, Terri A. Georgen, <sup>-Running</sup> Trustee for the Bankruptcy Estate of Michael R. Russell and Kimberly A. Russell, the moving party named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on August 23, 2004

  
Terri A. Georgen - Running

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

BKY No. 02-41020  
ADV No. 04-4105

Michael R. Russell and Kimberly A. Russell,  
  
Debtor(s).

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Terri A. Georgen, Trustee,  
  
Plaintiff,

vs.

**AMENDED COMPLAINT**

Kimberly A. Russell,  
  
Defendant.

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Terri A. Georgen, Trustee (“Trustee”) of the Bankruptcy Estate of Michael R. Russell and Kimberly A. Russell (“Debtors”) as and for her Complaint against Kimberly A. Russell (“Defendant”), states and alleges as follows:

1. Trustee is the duly appointed Chapter 7 Trustee of the bankruptcy estate of the Debtor.
2. This bankruptcy case was commenced on March 19, 2002 by the filing of a voluntary Chapter 7 petition.
3. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. §157(b)(2).

**Exhibit A**

4. This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§157 and 1334. This case arises under 11 U.S.C. §§541, 542 and 544.

5. On March 19, 2002, the Debtors commenced their bankruptcy case as a Chapter 13 proceeding. Listed among the property belonging to Kimberly A. Russell was a “structured settlement, personal injury action, payable \$15,000 in 2007 and \$71,739.00 in 2012.” (“Structured Settlement”). A true and correct copy of that portion of Schedule B is attached hereto as Exhibit A.

6. The Defendant attempted to claim the Structured Settlement as exempt pursuant to Minn. Stat. §550.37(22). A true and correct copy of the Defendant’s Schedule C to that effect is attached hereto as Exhibit B.

7. The Chapter 13 Trustee objected to the claim Structured Settlement exemption and a hearing was set on the objection for June 5, 2002. The Defendant did not file a response to the objection but, on June 4, 2002, one day before the scheduled hearing, converted the case to one under Chapter 7.

8. In the Defendant’s Schedule B filed in conjunction with the Chapter 7, the Defendant changed her position asserting in the converted case that the Structured Settlement was not property of the estate. A copy of that Schedule B is attached hereto as Exhibit C. The Defendant did not seek to claim the Structured Settlement as exempt in the converted case.

9. The Structured Settlement is an annuity with group annuity contract number GA001. A true and correct copy of Group Annuity Certificate is attached hereto as Exhibit D (“Annuity”). The Annuity was “self-settled” because it was established at the direction of the Debtor for the benefit of the Debtor, using settlement monies owed to the Debtor. The annuitant is Kimberly A. Sullivan n/k/a Kimberly A. Russell.

10. Because among other things, the Annuity is “self-settled” the Annuity does not qualify as a “spend thrift trust” under state law, and the Annuity became property of the estate upon the filing of a Chapter 7 petition.

11. Upon information and belief, while the Annuity states that it cannot be pledged or assigned as security, the Debtors’ rights in the Annuity can be sold or transferred by the Debtor.

12. The Plaintiff seeks a determination by the court that the Annuity and/or rights to payment from the Annuity became property of the bankruptcy estate at the commencement of this bankruptcy case, and remain property of the estate.

13. Because the Annuity and/or rights to payment from the Annuity are property of the bankruptcy estate, the Trustee also seeks an order from the court requiring the Defendant to turnover to the Trustee the Annuity and/or rights to payment from the Annuity, and declaring that the Trustee is the owner of the Annuity and/or rights to payment from the Annuity.

## **COUNT 2**

14. Plaintiff realleges and reaffirms paragraphs 1 through 13 above.

15. The Annuity and/or rights to payment from the Annuity are not subject to any applicable exemption by the Debtor, nor has the Debtor claimed the Annuity and/or rights to payment from the Annuity as exempt in this case.

16. As of commencement of the bankruptcy case, the Trustee had all the rights and powers set forth under 11 U.S.C. §544.

17. Because the Annuity and/or rights to payment from the Annuity are not subject to exemption, the lien interest held by the Trustee pursuant to 11 U.S.C. §544 against the Annuity and/or rights to payment from the Annuity is superior to any claimed interest of the Debtor in the Annuity and/or rights to payment from the Annuity.

WHEREFORE, Plaintiff respectfully requests that this Court make its Order:

1. Determining that the Annuity and/or rights to payment from the Annuity are property of the bankruptcy estate, and ordering the Defendant, Kimberly A. Russell, to turnover to the bankruptcy estate the Annuity and/or rights to payment from the Annuity.

2. Determining that the Defendant's claimed interest in the Annuity and/or rights to payment from the Annuity are inferior to the rights held by the Trustee pursuant to 11 U.S.C. §544 and determining that the Defendant is entitled to nothing from the Annuity and/or rights to payment from the Annuity until such time as all Chapter 7 administrative expenses and creditor claims have been paid in full.

3. Awarding the Plaintiff her costs and expenses in this matter.

4. For such other and further relief as the court deems just and equitable.

**FULLER, SEAVER & RAMETTE, P.A.**

Dated: \_\_\_\_\_, 2004

By: \_\_\_\_\_  
Randall L. Seaver 152882  
12400 Portland Avenue South, Suite 132  
Burnsville, MN 55337  
(952) 890-0888

Attorneys for Plaintiff



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

BKY No. 02-41020  
ADV No. 04-4105

Michael R. Russell and Kimberly A. Russell,

Debtor(s).

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Terri A. Georgen, Trustee,

Plaintiff,

vs.

**MEMORANDUM IN SUPPORT OF MOTION  
FOR AUTHORIZATION TO SERVE AND  
FILE AMENDED COMPLAINT**

Kimberly A. Russell,

Defendant.

-----  
**INTRODUCTION**

The Plaintiff in this case seeks to amend her Complaint to clarify that she is seeking a determination that she is entitled to all of the benefits under the Annuity, and also to assert claims based upon her rights under 11 U.S.C. §544.

**FACTUAL BACKGROUND**

This case was originally filed as a Chapter 13 case March 19, 2003 and was converted to one under Chapter 7 on June 4, 2003. The first meeting of creditors was originally scheduled for July 11, 2002.

## **LEGAL ARGUMENT**

Leave to amend a pleading shall be freely given when justice so requires. *See* Bankruptcy Rule 7015, incorporating Fed. R. Civ. P. 15. Generally, leave to amend a pleading should only be denied when the amendment would unduly prejudice the Defendant. *In re Drexel Burnham Lambert Group, Inc.*, 159 B.R. 420 (S.D.N.Y. 1993). One of the functions of the liberal amendment policy of Rule 15 is to enable a party to assert matters which were unknown to him at the time of the original pleading. *In re Dunn*, 49 B.R. 547 (Bankr. W.D.N.Y. 1985).

The proposed amendment does not prejudice the Defendant. The Amended Complaint in this matter asserts that the rights to payment from the Annuity as well as the Annuity itself is estate property. The Amended Complaint also seeks the court's determination that the Trustee's rights under §544 are superior to the Debtor's rights in the Annuity and/or rights to payments under the Annuity.

If the Defendant needs further discovery time as a result of the filing of the Amended Complaint, the Trustee consents to additional discovery time.

Because the next payment under the Annuity is not due until 2007, any slight delay in this litigation through filing of the Amended Complaint is of no prejudice.

There is no prejudice to the Defendant by the court authorizing the filing and service of an Amended Complaint.

## **CONCLUSION**

For the reasons set forth above, the Trustee respectfully requests that the court enter an order authorizing the Trustee to file and serve the Amended Complaint.

**FULLER, SEAVER & RAMETTE, P.A.**

Dated: August 23, 2004

By: /e/ Randall L. Seaver

Randall L. Seaver 152882  
12400 Portland Avenue South, Suite 132  
Burnsville, MN 55337  
(952) 890-0888

Attorneys for Plaintiff

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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Michael R. Russell and Kimberly A. Russell,  
  
Debtor(s).

-----  
Terri A. Georgen, Trustee,  
  
Plaintiff,

vs.

**UNSWORN CERTIFICATE OF SERVICE**

Kimberly A. Russell,  
  
Defendant.

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I, Kari L. Fogarty, declare under penalty of perjury that on August 23, 2004 I mailed a copy of the following documents:

1. Notice of Motion and Motion for Authorization to Serve and File an Amended Complaint;
2. Memorandum in Support of Motion for Authorization to Serve and File Amended Complaint; and
3. Order Authorizing Amended Complaint

by first class mail, postage prepaid to each entity named below at the address stated below for each entity:

Lorie A. Klein  
Moss & Barnett  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129

Office of the United States Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

**FULLER, SEAVER & RAMETTE, P.A.**

Dated: August 23, 2004

By: /e/ Kari L. Fogarty  
Kari L. Fogarty  
Legal Secretary  
12400 Portland Avenue South, Suite 132  
Burnsville, MN 55337  
(952) 890-0888

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

BKY No. 02-41020  
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Michael R. Russell and Kimberly A. Russell,  
  
Debtor(s).

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Terri A. Georgen, Trustee,  
  
Plaintiff,

vs.

**ORDER AUTHORIZING  
AMENDED COMPLAINT**

Kimberly A. Russell,  
  
Defendant.

-----  
This matter came before the court on \_\_\_\_\_, 2004 pursuant to the Plaintiff's Notice of Hearing and Motion for Authorization to File and Serve an Amended Complaint. Appearances were as noted upon the record.

Based upon the files, records and proceedings herein, and the court being fully advised on the premises,

**IT IS HEREBY ORDERED:**

1. The Plaintiff's motion is granted and the Plaintiff is authorized to file and serve the Amended Complaint as requested in the motion; and
2. The Defendant shall respond to the Amended Complaint within ten (10) days after the service of the Amended Complaint.

**BY THE COURT:**

\_\_\_\_\_  
Nancy C. Dreher  
United States Bankruptcy Judge